

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PIRELLI ARMSTRONG TIRE
CORPORATION RETIREE MEDICAL
BENEFITS TRUST, derivatively on behalf of
WELLS FARGO & COMPANY, *et al.*,

Plaintiff,

v.

JOHN G. STUMPF, *et al.*,
Defendants.

and

WELLS FARGO & COMPANY, a Delaware
corporation, Nominal Defendant

No. C 11-2369 SI

(Consolidated)

**ORDER DENYING INDIVIDUAL
DEFENDANTS' MOTION TO
BIFURCATE DISCOVERY**

The individual defendants' motion to bifurcate discovery is scheduled for a hearing on May 18, 2012. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and hereby VACATES the hearing. For the reasons set forth below, the Court DENIES the motion.

DISCUSSION

The individual defendants move for an order bifurcating discovery, with the initial phase limited to demand futility. Defendants assert that bifurcated discovery will streamline this case and enable defendants to file a motion for summary judgment on demand futility, which if successful, will end this litigation. Plaintiff opposes the motion, contending that the individual defendants cannot relitigate the

1 issue of demand futility on summary judgment. Plaintiff contends that under *Zapata Corporation v.*
 2 *Maldonado*, 430 A.2d 779 (1981), once a court has determined that a majority of the board is tainted
 3 by self-interest, that board is disqualified from controlling the derivative litigation, and can only regain
 4 control of the shareholder's claims by forming a special litigation committee of independent directors,
 5 which defendants have not done here. Plaintiff also contends that bifurcation is unworkable because
 6 the factual issues of demand futility and breach of fiduciary duty are inextricably intertwined.

7 The Court has broad discretion to manage discovery. *See Hallett v. Morgan*, 296 F.3d 732, 751
 8 (9th Cir. 2002). The Court agrees with plaintiff that defendants' proposed bifurcation of discovery is
 9 impractical and would prove inefficient because there is significant overlap between the demand futility
 10 and breach of fiduciary duty issues. Plaintiff alleges that defendants breached their duty of loyalty by,
 11 *inter alia*, failing to disclose that in the course of government investigations, Wells Fargo had opposed
 12 discovery requests, filed motions to quash, and refused to provide details concerning the Company's
 13 policies. These are the same factual issues that defendants propose should be the subject of discovery
 14 in the first phase of bifurcated discovery. Under these circumstances, bifurcation would likely lead to
 15 disputes regarding whether a fact falls within the demand futility issue or the breach of fiduciary duty
 16 issue. Further, if the Court bifurcated discovery and defendants were not successful on their motion
 17 for summary judgment¹ on demand futility, phase two of discovery would undoubtedly involve
 18 duplicative discovery requests and depositions, resulting in inefficiencies and increased costs for all
 19 parties.


23 ¹ The Court disagrees with plaintiff that defendants may not bring a motion for summary
 24 judgment on demand futility. Defendants cite a number of cases, decided after *Zapata*, in which courts
 25 held that defendants could challenge demand futility on a factual record after surviving a motion to
 26 dismiss. *See, e.g., Good v. Getty Oil Co.*, 518 A.2d 973, 975 (Del. Ch. 1986); *Oakland Raiders v. Nat'l*
 27 *Football League*, 93 Cal. App. 4th 572, 585 (2001) (finding Delaware corporate law "identical" to
 28 California law, and citing *Good* for the proposition that a defendant can raise demand futility as a fact
 issue in a context other than a motion to dismiss). *Zapata* held that Delaware law allows corporations
 to respond to a derivative suit by appointing independent directors to a special litigation committee
 which would investigate the allegations of the derivative suit, and could then move to dismiss the case.
See generally Zapata, 430 A.2d at 784-89. *Zapata* did not address the question of whether director
 defendants could challenge demand futility as a factual matter on summary judgment.

CONCLUSION

For the foregoing reasons, the Court DENIES defendants' motion to bifurcate discovery. Docket Nos. 96 & 97.

IT IS SO ORDERED.

Dated: May 16, 2012



SUSAN ILLSTON
United States District Judge